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Sandra Levitsky

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*Sandra Levitsky**

In December 1992, Francine Ryczek worked as a student intern for Guest Services, a Washington, D.C.-based company specializing in the culinary arts. During her tenure at Guest Services she worked under the supervision of Chef Catherine O'Brien.[1] Ryczek alleges that early in her tenure, O'Brien expressed having a sexual preference for women. O'Brien went on to inquire into Ryczek's own sexual activities, commenting to and touching Ryczek in ways Ryczek felt were sexual and inappropriate.[2] At one point, O'Brien caught Ryczek alone in an elevator and removed her own shirt in an apparent attempt to elicit a sexual response from Ryczek.[3] Ultimately, Ryczek felt compelled to leave the program due to what she perceived as an environment filled with sexual harassment.[4] Ryczek subsequently sued Guest Services under Title VII of the 1964 Civil Rights Act.[5]

Guest Services moved for summary judgment on Ryczek's claim, arguing Title VII created no cause of action for sexual harassment involving members of the same gender.[6] In an attempt to invoke a Title VII loophole unintentionally created by Judge Spottswood W. Robinson, III in *Barnes v. Costle*,[7] Guest

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1. Ryczek v. Guest Servs., Inc. 877 F. Supp. 754, 756 (D.C. Cir. 1977).
2. *Id.*
3. *Id.*
4. *Id.* As a result, Ryczek received a failing grade on one project for the internship, required counseling, and missed several months of school and work. *Id.* at 756-57.
5. *Id.* at 757. Ryzcek also asserted claims for breach of contract, breach of covenant of good faith and fair dealing, negligent supervision, tortious interference with contract, and negligent and intentional infliction of emotional distress. *Id.*
6. *Id.*
7. 561 F.2d 983 (D.C. Cir. 1977).

Services argued O'Brien was bisexual.[8] Judge Robinson stated in his now-notorious footnote fifty-five that "[i]n the case of a bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."[9]

The *Ryczek* facts bring to life a legal debate which for two decades has existed only in the realm of the hypothetical.[10] Courts have acknowledged that under current sexual harassment standards, harassers are liable for sex discrimination only when they treat members of one sex differently than members of the opposite sex.[11] Thus in cases of equal opportunity sexual harassment,[12] in which a person presumably harasses both men and women equally, victims have no Title VII remedy.[13] As Guest Services' arguments in *Ryczek* suggest, many courts also deny a Title VII cause of action to victims of same-sex sexual harassment. Courts do so for the same reason they deny a cause of action to victims of equal opportunity sexual harassment—the harassment was not based on "sex."[14] Such a result seems inappropriate given that victims of equal opportunity and same-sex sexual harassment suffer no less an injury from sexual harassment than victims of opposite-sex sexual harassment. Ryczek found her workplace no less hostile, demeaning or offensive because her harasser was bisexual or homosexual.

This Note uses same-sex and equal opportunity sexual harassment cases to illustrate the inadequacies of current sexual harassment standards under Title VII's "because of ... sex"

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8. *Ryczek*, 877 F. Supp. at 761.

9. *Id.* (quoting Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977)). While the *Ryczek* court declined to rule on the issue of same-sex or bisexual sexual harassment, it did state in dictum that the D.C. Circuit did not "recognize a Title VII cause of action for sexual harassment when the supervisor [was] bisexual." *Id.* at 761-62.

10. Judge Robinson first raised the issue of the bisexual harasser in Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

11. *See infra* note 81 (citing cases in which courts acknowledged an inability to reconcile current sexual harassment doctrine with the case of equal opportunity sexual harassment).

12. *See infra* notes 79-80 and accompanying text (distinguishing between bisexual and equal opportunity sexual harassment).

13. *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (stating in dicta that victims of equal opportunity harassment have no Title VII cause of action), *cert. denied*, 481 U.S. 1041 (1987).

14. *See* sources cited *infra* note 81 (denying a Title VII cause of action to victims of same-sex sexual harassment).

requirement.[15] It offers an alternative analysis that recognizes inequalities in the workplace exist independently of whether employers treat men differently from women. Part I discusses current and evolving definitions of sexual harassment and their application to same-sex and equal opportunity sexual harassment cases. Part II discusses the courts' use of the "but for" causation test in sexual harassment cases. It argues the test allows for too much judicial discretion in deciding when sexual harassment occurs "because of sex," and this discretion disproportionately affects victims of same-sex and equal opportunity sexual harassment. It then criticizes the use of a comparative standard in sexual harassment cases for not recognizing cases in which discrimination occurs when employers appear to treat men and women similarly. Part II also discusses legislative proposals for resolving the problems faced by victims of same-sex and equal opportunity harassment and argues these proposals fail to address the inadequacies of current sexual harassment standards. Part III then proposes an alternative standard that would eliminate both the "but for" and comparative standards in favor of an analysis holding employers accountable for any harassment that is based on gender or gender stereotypes which perpetuate a gender hierarchy.

I. EVOLVING DEFINITIONS OF SEXUAL HARASSMENT

A. TITLE VII, THE EQUALITY PRINCIPLE, AND ITS PROGENY

Title VII of the 1964 Civil Rights Act makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[16] Congress enacted the original version of the civil rights bill as a remedy for discrimination against blacks and other racial minorities, and not necessarily as a remedy for discrimination against women.[17] In fact, Representative Howard Smith of

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15. *See infra* text accompanying note 16 (quoting the protective language of Title VII).

16. 42 U.S.C. § 2000e-2(a)(1) (1988).

17. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (stating that the language of Title VII makes plain Congress's purpose was to eliminate "those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens"); *see also* Marie Elena Peluso, Note, *Tempering Title VII's Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimi-*

Virginia, a strident opponent of the civil rights bill, introduced the additional category of "sex" to the bill as a political attempt to assure the bill's defeat.[18] Records of the House committee hearings on Title VII contain no discussion of sex discrimination.[19] Nevertheless, the House passed Smith's amendment and eventually the entire Civil Rights Act.[20]

The Act's prohibitions apply to most employers in the United States.[21] Unlawful employment practices under Title VII include discriminating on the basis of sex in hiring or firing, wages and salaries, promotions, or any terms, conditions, or privileges of employment.[22] Title VII also prohibits an employer from taking any action against a person filing a charge of discrimination under the Act.[23] Responsibility for administering and enforcing Title VII lies with the Equal Employment Opportunity Commission (EEOC).[24]

1. Overview of the Equality Principle

In the struggle to gain access to a wider range of job opportunities, women have relied on Title VII as their primary litigation tool and the "equality principle" as the analytical basis for their legal arguments.[25] Basic to both our political and legal system, the

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nation, 46 VAND. L. REV. 1533, 1536 n.11 (1993) (describing the 1964 Civil Rights Act as specifically targeting discrimination against blacks).

18. WILLIAM N. ESKRIDGE, JR. AND PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 15 (1995)

19. Peluso, *supra* note 17, at 1537 n.15. Women had been lobbying for a federal law proscribing sex-based discrimination in employment for many years. Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310 (1968). Congress responded to these lobbying efforts by passing the Equal Pay Act of 1963, but there was little congressional support for a law directly outlawing employment discrimination based on sex. *Id.*

20. ESKRIDGE & FRICKEY, *supra* note 18, at 16.

21. Title VII generally applies to private employers and labor unions of fifteen or more people, public and private employment agencies, and educational institutions as well as State and local governments. 42 U.S.C. § 2000e. For additional requirements relating to the applicability of Title VII, see § 2000e(b)-(e).

22. § 2000e-2.

23. § 2000e-3(a).

24. § 2000e-4.

25. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1186 (1989); *see also* DEBORAH L. RHODE, JUSTICE AND GENDER 81-107 (1989) (describing the emergence of contemporary gender discrimination analysis); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 198-99

equality principle is based on the belief that society should treat similarly situated people similarly.[26] Under this doctrine, employment discrimination occurs when employers treat employees who are similarly situated differently.[27] Consequently, sexual harassment is a form of employment discrimination because it is one method of treating some employees differently than others.[28]

In 1986, the Supreme Court articulated how sexual harassment constituted a form of discrimination "because of sex" in the landmark decision of *Meritor Savings Bank v. Vinson*:[29]

> "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."[30]

In a separate case, the Court also noted that a discriminatorily abusive work environment will often detract from employees' job performance, discourage employees from remaining on the job, or

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(1989) (describing the use of equality theory in early feminist scholarship); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1142 (1986) (discussing the improvements women have achieved in the workplace by appealing to the equality theory); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 300-01 (same).

26. Finley, *supra* note 25, at 1142.

27. *See* Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 205-06 (discussing the definition of discrimination under the formal equality doctrine).

28. *See generally* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816-26 (1991) (discussing the application of Title VII to sexual harassment discrimination).

29. 477 U.S. 57 (1986). For sexual harassment to be actionable, the Court held that it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). The gravamen of any sexual harassment claim, the Court noted, is that the alleged sexual advances were unwelcome. *Id.* at 68.

The *Meritor* standard for sexual harassment was affirmed by the Supreme Court in Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 370 (1993). In *Harris*, a unanimous Court held that harassing conduct need not cause psychological injury for a plaintiff to bring an actionable Title VII claim. *Id.* at 370-71. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." *Id.* at 371.

30. *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 902).

keep them from advancing in their careers.[31] One premise behind characterizing sexual harassment as discrimination is that an employee of one sex should not have to endure abusive working conditions if an employee of the opposite sex is working abuse-free.

2. Current Standards for Characterizing Sexual Harassment as Discrimination: The "But For" and Comparative Standards

Title VII does not proscribe all offensive sexual conduct in the workplace, only harassment that a person directs toward a victim because of his or her sex.[32] To determine whether harassment occurs because of the victim's sex, the court applies two tests, one to determine causation and the other to determine whether the harassment was discriminatory.[33] Typically, courts attempt to determine causation by applying a "but for" test modeled after tort law concepts—but for the plaintiff's sex, would the plaintiff have been the object of harassment?[34] The "but for" test requires the plaintiff to demonstrate that because of his or her "sex," the harasser singled out the victim for harassment.[35] Victims of

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31. *Harris*, 114 S. Ct. at 370-71.

32. 42 U.S.C. § 2000e-2(a)(1).

33. *See* McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995) (stating that a plaintiff must establish harassment was "based upon sex" by showing that but for the fact of her sex, she would not have been the object of harassment, and that her harasser did not treat male employees in a similar fashion); Valadez v. Uncle Julio's of Illinois, Inc., 895 F. Supp. 1008, 1014 (N.D. Ill. 1995) (stating the "critical issue" as whether the plaintiff was exposed to disadvantageous terms or conditions of employment to which male employees were not exposed); Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1137 (C.D. Ill. 1995) (applying the *McCoy* two part test to a determination of sexual harassment); *see generally* Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of* Price Waterhouse v. Hopkins, 15 VT. L. REV. 89, 100-04 (1990).

34. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 262 (1989) (O'Connor, J., concurring) ("[A] substantive violation [of Title VII] only occurs when consideration of an illegitimate criteria is the 'but for' cause of an adverse employment action."); *see also* Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (stating that to prove a claim for sexual harassment, a plaintiff must show that but for the fact of her sex, she would not have been the object of harassment).

35. In *Price Waterhouse*, the Court stated:

> In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that the factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.

490 U.S. at 240. The Court further explained that the critical inquiry is whether gender was a factor at the moment an employment decision was made.

same-sex and equal opportunity sexual harassment have had difficulty meeting this test because judges often conclude that the harasser's "sexual orientation" was the motivation for the harassing conduct rather than the victim's "sex."[36]

In addition to the "but for" test, courts apply a comparative standard to determine whether harassment was discriminatory: Did the harasser treat the plaintiff differently than a similarly situated employee of the opposite sex?[37] Some courts have found the comparative standard problematic for victims of same-sex harassment because there is no similarly situated employee of the opposite sex with which to compare the victim's treatment. Moreover, the harasser is not harming the victim based on the victim's sex, because the harasser and the victim are of the same sex.[38] "[The same-sex harasser] certainly does not despise the entire [sex], nor does he wish to harm its members, since he is a member himself and finds others of the group sexually attractive."[39] Similarly, courts cannot readily apply the comparative standard to cases of equal opportunity sexual harassment. The harasser in such cases does not treat the plaintiff differently than members of the opposite sex—by definition, the harasser harasses

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When an employer considers sex along with legitimate factors at the time of making an employment decision, the "because of sex" requirement is met. *Id.* at 241.

36. *See infra* notes 120-127 and accompanying text (describing the "but for" standard and its application to same-sex and equal opportunity harassment cases).

37. The EEOC Compliance Manual states: "[T]he crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex." EEOC COMPLIANCE MANUAL (CCH) § 615.2(b)(3) (1993) [hereinafter EEOC MANUAL]. For courts relying on the EEOC language, see Raney v. District of Columbia, 892 F. Supp. 283, 287 (D.D.C. 1995); Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1181 (N.D. Ill. 1995); *see also* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 372 (1993) (Ginsburg, J., concurring) ("The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.")

38. *See, e.g.*, Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) ("During the times relevant to his claim, Goluszek was a male in a male-dominated environment. In fact, with [one] exception . . . each and every one of the figures in this story was a male. . . . Goluszek may have been harassed 'because' he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace."); *see also infra* note 73 (citing cases which rely upon the court's reasoning in *Goluszek*).

39. Ellen F. Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 352 (1990).

both sexes equally.[40]

3. Current Definitions of Sexual Harassment

According to the EEOC Guidelines,[41] sexual harassment occurs when "submission to [unwelcome sexual] conduct[42] is made either explicitly or implicitly a term or condition of an individual's employment."[43] Under the regulatory guidelines, there are two types of sexual harassment: "quid pro quo" and

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40. *See infra* notes 80-82 and accompanying text (defining equal opportunity harassment).

41. Congress granted the EEOC authority to issue regulations to carry out the provisions of Title VII. 42 U.S.C. § 2000e-12. EEOC regulations, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)).

42. The EEOC has endorsed the Eleventh Circuit's definition of "unwelcome conduct"; the conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." EEOC MANUAL, *supra* note 37, ¶ 3114 (Mar. 19, 1990) (quoting Henson v. Dundee, 682 F.2d 897, 903 (11th Cir. 1982)). The Supreme Court in *Meritor* held that a plaintiff's voluntariness "in the sense that the complainant was not forced to participate against her will" in sex-related conduct, did not preclude a finding that the conduct was "unwelcome." 477 U.S. at 68-69. Thus, a court could find that a plaintiff was coerced into engaging in a sexual relationship with a supervisor, even though as a matter of criminal law she had "consented" to such a relationship. Debra L. Raskin, *Sexual Harassment in Employment*, 108 ALI-ABA COURSE OF STUDY 141, 145 (1995).

The welcome or unwelcome nature of sexual advances is often one of the most disputed elements of hostile work environment claims. *Id.* at 144. Susan Estrich has argued that the unwelcomeness requirement should be eliminated from both quid pro quo and hostile work environment cases altogether because, in practice, the actions of both traditional and nontraditional women can be used against them to negate a finding of unwelcomeness:

> A woman who behaves in the most stereotypical ways—complimenting men, straightening their ties . . . eating dinner with the boss on a business trip, or remaining friendly even after rejecting his advances—may find that the sexual advances she rejects are, as a matter of law, not unwelcome. Similarly, women who act too much like men—who use "crude and vulgar language," or choose to eat with the men in the employee lunchroom—cannot be heard to complain of a worksite which is "permeated by an extensive amount of lewd and vulgar conversation and conduct."

Estrich, *supra* note 28, at 830; *see also* Deborah L. Rhode, *Sexual Harassment*, 65 S. CAL. L. REV. 1459, 1462-63 (1992) (criticizing the unwelcomeness requirement for focusing on the victim's behavior and judging whether the harasser's behavior was illegal based on the victim's conduct).

43. 29 C.F.R. § 1604.11(a)(1) (1995).

"hostile environment."[44] Quid pro quo harassment occurs when an employer uses submission to or rejection of sexual advances, sexual favors, and other sexual conduct as the basis for employment decisions affecting an employee.[45] A manager conditioning an employee's raise upon submission to a request for sexual favors, or a supervisor demoting or firing a subordinate for refusing to engage in sexual conduct, are both examples of quid pro quo sexual harassment.[46]

Alternatively, hostile environment harassment includes unwelcome sexual conduct that "unreasonably interfer[es] with an individual's work performance or creat[es] a hostile, intimidating or offensive working environment."[47] Unlike quid pro quo harassment cases, plaintiffs in a hostile work environment case do not have to demonstrate that they suffered some form of economic injury, such as discharge, demotion, or loss of promotion or salary.[48] The Court has held that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult," regardless of whether harassment leads to economic injury.[49]

To determine whether offending conduct is sufficiently "severe

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44. *Id.* § 1604.11(a)(2)-(3).

45. *Id.* § 1604.11(a)(2). To establish a prima facie case of quid pro quo harassment, a plaintiff must prove that the employee is a member of a protected class; that the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; that the harassment was based on sex; that the employee's submission to the unwelcome advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment; and the existence of employer liability. Henson v. Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

46. *See* Janet Hughie Smith et al., *Sex Discrimination in the Workplace: Some Guidelines for Employers and Legal Update*, 983 ALI-ABA COURSE OF STUDY 135, 140 (1995) (describing situations that may constitute quid pro quo harassment).

47. 29 C.F.R. § 1604.11(a)(3). An employee asserting a claim of hostile work environment sexual harassment must prove that the employee belongs to a protected group; that the employee was subject to unwelcome sexual harassment; that the harassment was based on sex; and that the harassment affected a term, condition or privilege of employment and was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Raskin, *supra* note 42, at 150 (citing Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1557 (11th Cir. 1987). The "based on sex" element in both quid pro quo and hostile environment sexual harassment claims increasingly has become the subject of dispute in equal opportunity and same-sex sexual harassment cases. *Id.* at 153.

48. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

49. *Id.*

and pervasive"[50] as to constitute hostile work environment sexual harassment, courts look to the "record as a whole" and the "totality of the circumstances."[51] Circumstances may include the frequency and severity of the behavior, whether it is physically threatening or humiliating, whether it unreasonably interferes with an employee's work performance, and whether the harasser was in a position of superiority at the time of the harassment.[52]

B. EXPANDING DEFINITIONS OF SEXUAL HARASSMENT

The most widely recognized form of sexual harassment involves the harassment of a female employee by a male supervisor, typically in the form of sexual innuendoes or propositions.[53] Courts have expanded this "classic" definition of sexual harassment to include situations in which a woman is not herself the object of harassment, but where she is forced to work in an atmosphere in which such harassment is pervasive,[54] as well as to situations in which the harassment is not clearly sexual in nature.[55] Courts are divided on the issue of whether they should expand the definition of sexual harassment to instances in which a supervisor harasses a member of the same sex or harasses men

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50. For sexual harassment to be actionable, the Court in *Meritor* held it "must be sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

51. *Id.* at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).

52. *See* Smith, *supra* note 46, at 140-41 (describing factors the EEOC and courts will consider in hostile work environment cases); *see also* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993) (listing those circumstances which courts should examine in determining whether an environment is "hostile or abusive").

53. EEOC MANUAL, *supra* note 37, ¶ 3101.

54. *See* Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985) ("Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive."), *cert. granted sub nom.*, PSFS Sav. Bank v. Vinson, 474 U.S. 815, *and aff'd sub nom.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

55. *See* Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (holding offensive conduct is not necessarily required to include sexual overtones in every instance); Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (holding sexual harassment does not have to take the form of sexual advances or other incidents with clearly sexual overtones). *But see* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 622-24 (6th Cir. 1986) (holding a workplace replete with pornography and male supervisors who regularly call female employees names like "cunt," "pussy," and "whore" would not interfere with a reasonable person's work performance or psychological well-being), *cert. denied*, 481 U.S. 1041 (1987).

and women equally.[56] At the heart of the dispute is the question of whether such harassment occurs because of the victim's sex.[57]

1. Distinguishing Sex from Gender

Title VII does not define "sex," and the Supreme Court has not defined "gender" or "sex" as legal concepts.[58] Yet the distinction plays a crucial role in same-sex and equal opportunity sexual harassment cases. This Note uses "sex" to refer to all that is biological—chromosomes, hormones and genitalia.[59] "Gender," on the other hand, refers to what society labels "masculine" and "feminine."[60] It is what one acquires as a social role from social expectations for the ways each sex should act, look, feel and speak.[61] These social expectations, often referred to as gendered scripts,[62] are commonly mutually exclusive between male and female.[63] Society tends to expect men to act aggressive, competi-

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56. *See infra* notes 70, 74 and accompanying text (citing cases recognizing a cause of action for same-sex and equal opportunity sexual harassment).

57. *See infra* notes 70-92 and accompanying text (discussing debate over whether same-sex and equal opportunity harassment occurs "because of sex").

58. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law & Society*, 83 CAL. L. REV. 1, 23 (1995) (noting the absence of legal definitions for "sex" and "gender" under either Title VII or Supreme Court cases). Nevertheless, the Supreme Court has recognized the word "sex" in Title VII means "gender" as well. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1436 n.1 (1994) (Scalia, J., dissenting) (providing a brief explanation of the distinction between "sex" and "gender"); Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1986) (stating Title VII "sex" language means "gender" distinctions must be irrelevant to employment); *see also* Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982) (stating Title VII prohibits employment discrimination on the basis of gender); Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1181 n.1 (N.D. Ind. 1995) (stating "sex" in Title VII means "gender"); Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1171 n.1 (D. Nev. 1995) (noting the Supreme Court uses the broader term "gender" when referring to Title VII's "sex" provision); Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822, 832 n.17 (M.D. Md. 1994) (same). *But see* Dillon v. Frank, 58 Empl. Prac. Dec. (CCH) ¶ 41,332, at 70,104 n.2 (6th Cir. Jan. 15, 1992) (relying on the biological definition of "sex" in denying a Title VII cause of action to a victim of same-sex harassment).

59. *See* JOHN MONEY, GAY, STRAIGHT AND IN BETWEEN 52-53 (1988) (describing the distinction between "sex" and "gender"); I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1160 (1991) (same).

60. Capers, *supra* note 59, at 1160.

61. *See* MONEY, *supra* note 59, at 52-53 (distinguishing "sex" from "gender").

62. *Id.*

63. SANDRA L. BEM, THE LENSES OF GENDER 80-81 (1993); *see also* MARILYN FRYE, THE POLITICS OF REALITY 31-33 (1983) (describing how society constructs and maintains a gender dichotomy); Capers, *supra* note 59, at 1160-62 (same).

tive, assertive, analytical and rational, and women to act passive, deferential, affectionate, sexy and attractive.[64] Society, and in this context employers, too often values more highly those characteristics associated with being male than those associated with being female.[65]

2. Same-Sex Sexual Harassment

Courts not only have to resolve cases of sexual harassment without the assistance of concrete legal definitions for sex and gender, they also must resolve cases involving parties with increasingly diverse combinations of sex, gender, and sexual orientation.[66] Most reported cases of sexual harassment involve harassment of an employee by a heterosexual supervisor of the opposite sex.[67] In contrast, same-sex sexual harassment occurs in two forms. First, it may occur when a homosexual supervisor or

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64. FRYE, *supra* note 63, at 31-33; Capers, *supra* note 59, at 1162; *see also* Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 352-53 (1992) (describing gender stereotypes).

65. *See* CYNTHIA FUCHS EPSTEIN, DECEPTIVE DISTINCTIONS 14, 233 (1988) (arguing dichotomous distinctions like male-female are ranked comparisons, with those characteristics associated with being male ranking higher); FRYE, *supra* note 63, at 32 (describing gender differences as systematically benefiting men and disadvantaging women); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 208 (arguing the social meanings attached to gender systematically favor men in both public and economic spheres). Barbara Gutek argues that women are seen as sexual beings and men as organizational beings. Gutek, *supra* note 64, at 352-53. She notes the stereotypes are mutually exclusive: in most cases it is virtually impossible to be both sexual and a worker at the same time. *Id.* at 354-55.

66. *See* Nogueras v. University of P.R., 890 F. Supp. 60, 61 (D.P.R. 1995) (involving female supervisor sexually harassing female employee); Roe v. K-Mart Corp., No. CIV.A.2:93-2372-18AJ, 1995 WL 316783, *1 (D.S.C. March 28, 1995) (involving gay, male supervisor sexually harassing gay male employee); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1335 (D. Wyo. 1993) (involving male supervisor sexually harassing male and female employees); Polly v. Houston Lighting & Power Co., 803 F. Supp 1, 4 (S.D. Tex. 1992) (involving anti-gay harassment of male employee by male coworkers).

67. The typical case involves a male supervisor who sexually harasses a female employee, but courts also have recognized that female supervisors may sexually harass male employees. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) ("The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment.") (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)); *see also* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) ("Sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women . . . would not also be actionable in appropriate cases.").

coworker sexually harasses an employee of the same sex.[68] Second, same-sex harassment may involve anti-gay harassment of a homosexual employee or an employee coworkers believe to be homosexual.[69]

Courts have equivocated over the past twenty-five years on whether they should recognize a Title VII cause of action for same-sex sexual harassment. District court opinions in the 1980s held that Title VII proscribed both opposite-sex and same-sex harassment.[70] In 1988, however, the District Court for the Northern District of Illinois held Title VII remedies do *not* extend to same-sex sexual harassment in the highly influential case of *Goluszek v. Smith*.[71] The court reasoned it was not "the type of conduct Congress intended to sanction when it enacted Title VII."[72] Currently, the courts are divided between those that adhere to

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68. *See* Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 542 (M.D. Ala. 1983) (involving male employee harassed by gay supervisor), *aff'd*, 749 F.2d 732 (11th Cir. 1984); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981) (same).

69. *See, e.g.*, Polly v. Houston Lighting & Power Co., 803 F. Supp. 1, 4 (S.D. Tex. 1992) (involving plaintiff subjected to verbal abuse—"faggot" and "queer"—as well as physical abuse—a broom handle was forced against his rectum). Courts have uniformly held that anti-gay harassment is not actionable under Title VII. *See* cases cited *infra* note 76 (discussing anti-gay harassment as lying outside the purview of Title VII). Because victims of both types of same-sex harassment face similar obstacles when establishing a prima facie case of sexual harassment, this Note generally refers to both types as "same-sex" harassment. *See infra* notes 120-127 and accompanying text (discussing courts' tendency to conflate sex with sexual orientation in cases of same-sex and anti-gay harassment). When discussing the ways in which courts treat victims of the two types of same-sex harassment differently, this Note refers to the first as "same-sex" harassment and the second as "anti-gay" harassment.

70. *See, e.g.*, *Joyner*, 597 F. Supp. at 541 (holding quid pro quo male-male harassment violates Title VII); *Wright*, 511 F. Supp. at 310 (same). *But see* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) ("The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."), *cert. denied*, 471 U.S. 1017 (1985).

71. 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Anthony Goluszek worked as a mechanic in a mostly male factory. Coworkers persistently taunted Goluszek, targeting his sexuality. The court heard testimony that Goluszek "blushed easily" and was abnormally sensitive to comments pertaining to sex. *Id.* at 1453. Coworkers periodically asked Goluszek if he had got any "pussy," showed him pictures of nude women, told him they would get him "fucked," and accused him of being gay or bisexual. *Id.* at 1454. They poked him in the buttocks with a stick and made comments to him about "butt fucking in the ass." *Id.*

72. *Id.* at 1456.

Goluszek's reasoning[73] and those that dispute *Goluszek*, holding same-sex sexual harassment actionable under Title VII.[74]

Courts recognizing a cause of action for same-sex sexual harassment are careful to distinguish actionable same-sex harassment from anti-gay harassment.[75] Courts have uniformly held anti-gay harassment is based exclusively on sexual orientation, and that such harassment does not fall within Title VII's proscriptions.[76] This distinction creates the absurd situation in which courts are willing to hold gay men and lesbians liable for sexual harassment, but will not allow them to recover when they are themselves victimized by anti-gay workplace harassment.[77]

3. Equal Opportunity Sexual Harassment

While same-sex sexual harassment presents a twist to the

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73. *See* Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994); Ashworth v. Roundup Co., 897 F. Supp. 489, 494 (W.D. Wash. 1995); Benekritis v. Johnson, 882 F. Supp. 521, 525-26 (D.S.C. 1995); Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822, 834 (D. Md. 1994); Polly v. Houston Lighting & Power Co., 803 F. Supp. 1, 5-6 (S.D. Tex. 1992).

74. *See* Raney v. District of Columbia, 892 F. Supp. 283, 287 (D.D.C. 1995) (noting the *Goluszek* court did not support its proposition with any citations to the legislative record); EEOC v. Walden Book, 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995) (refuting the idea that Title VII requres a plaintiff to prove that the harasser is not of the same gender); Mogilefsky v. Superior Court, 20 Cal. App. 4th 1409, 1417 (disputing the *Goluszek* conclusion that the harassment involved was not the kind Congress intended to sanction when it enacted Title VII).

75. *See supra* notes 68-69 and accompanying text (differentiating between same-sex and anti-gay harassment).

76. *See* Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1180 (N.D. Ind. 1995) ("People who are harassed because they are homosexual—or are perceived as homosexual—are not protected by Title VII any more than are people who are harassed for having brown eyes."); Dillon v. Frank, 58 Empl. Prac. Dec. (CCH) ¶ 41,332, at 70,104 (6th Cir. Jan. 15, 1990) (holding Title VII does not proscribe discriminatory conduct based on sexual orientation); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979) (same); *see also* EEOC MANUAL, *supra* note 37, ¶ 3101 ("If a male supervisor harasses a male employee because of the employee's homosexuality, then the supervisor's conduct would *not* be sexual harassment since it is based on the employee's sexual preference, not on his gender. Title VII covers charges based on gender but not those based on sexual preference."); *cf.* HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 69 (1990) (stating no plaintiff has recovered under the theory that sexual orientation discrimination is essentially a form of gender discrimination).

77. *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 10 (1992) (noting that while Title VII protects employees from gays and lesbians, Title VII does not protect gays and lesbians).

classic male-on-female sexual harassment scenario, the case of the equal opportunity harasser challenges the very basis of current sexual harassment doctrine. Like same-sex sexual harassment cases, there are two types of cases involving the "bisexual defense."[78] In bisexual sexual harassment cases, the person harassing an employee is actually bisexual, but may not necessarily harass members of both sexes.[79] In equal opportunity sexual harassment cases, the supervisor sexually harasses members of both sexes, but may not actually be bisexual.[80] Most courts have acknowledged that equal opportunity harassment is not actionable under current Title VII sexual harassment standards.[81] Defendants continue, however, to raise the "bisexual defense" in both

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78. *See* Ryczek v. Guest Servs., 877 F. Supp. 754, 761 n.6 (D.D.C. 1995) ("The Court notes that [footnote fifty-five] in *Barnes* could be interpreted to prohibit Title VII sexual harassment cases any time a supervisor is bisexual. Alternatively, the language could mean that a supervisor is only immune from Title VII sexual harassment suits when there is evidence that the supervisor has actually harassed members of both sexes.").

79. In *Ryczek*, for example, the defendants argued O'Brien was bisexual, not that she actually harassed members of both sexes. *Id.* at 761.

80. *See, e.g.*, Cabaniss v. Coosa Valley Medical Ctr., No. CV 93-PT-2710-E, 1995 WL 241937, at *26-28 (N.D. Ala. March 20, 1995) (finding defendant harassed both men and women equally). In *Chiapuzio v. BLT Operating Corp.*, the court referred to harassers whose remarks are gender driven and directed at both men and women as "equal opportunity harassers." 826 F. Supp. 1334, 1337 (D. Wyo. 1993). Because victims of both bisexual and equal opportunity sexual harassment face similar obstacles under current sexual harassment doctrine, this Note uses the more general term "equal opportunity harassment" to refer to both.

81. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (stating that equal opportunity harassment is not gender discrimination), *cert. denied*, 481 U.S. 1041 (1987); Henson v. City of Dundee, 682 F.2d 897, 904 n.11 (11th Cir. 1982) ("Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex."); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("Only by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination—where a bisexual supervisor harasses men and women alike."); Raney v. District of Columbia, 892 F. Supp. 283, 288 (D.D.C. 1995) (stating that there is no discrimination in cases where a supervisor harasses both sexes equally); *Ryczek*, 877 F. Supp. at 761 n.6 (noting the language of footnote 55 in *Barnes* suggests that a supervisor is immune from Title VII sexual harassment suits when there is evidence that he or she harassed members of both sexes); *Chiapuzio*, 826 F. Supp. at 1336-37 (stating that current legal doctrines such as burden of proof or causation would require adjustments to adequately address the issue of equal opportunity harassment); *cf.* Corne v. Bausch & Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975) (stating it would be "ludicrous" to call sexual harassment sex discrimination "because to do so would mean that if the conduct complained of [(sexual advances from male supervisor to female employees)] was directed equally to males there would be no basis for suit").

types of cases.[82]

Under current sex discrimination doctrine, a court typically concludes something happens because of sex when it happens to one sex but not the other.[83] "The initial procedure is arithmetic: draw a gender line and count how many of each are on each side in the context at issue."[84] Because Title VII is premised on an ideal of formal equality that defines discrimination as the act of treating men and women differently who are actually similarly situated,[85] equal opportunity harassment is not sex discrimination.[86]

Courts have recognized in dicta that such an analysis produces an anomalous result: "a victim of sexual harassment . . . would have a Title VII remedy in all situations except those in which the victim is harassed by a particularly unspeakable cad

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82. The District Court for the District of Columbia first raised the issue by stating in a footnote that:

> It is no answer to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. In each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, but for his or her sex, the employee would not have faced. These situations, like that at bar, are to be distinguished from a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of a bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.

Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.D.C. 1977); *see infra* notes 90-92 and accompanying text (describing defendants' use of the "bisexual defense").

83. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 107 (1979).

84. *Id.*

85. *See* Becker, *supra* note 27, at 208 (discussing definitions of equality and discrimination under the formal equality doctrine); *see also supra* text accompanying notes 25-27 (describing the formal equality doctrine generally).

86. That a harasser could escape liability under Title VII because the harasser harassed men and women equally contradicts the reasoning of the Supreme Court's decision in Loving v. Virginia, 388 U.S. 1 (1967). The *Loving* Court rejected the argument that equal application of a racially discriminatory statute removes the statute from the Fourteenth Amendment's proscriptions. *Id.* at 8. The Court stated that the fact that both races were subject to a discriminatory statute did not take away from the Virginia legislature's racially motivated purpose in designing a statute to maintain white supremacy. *See id.* at 7-8 (rejecting the State's "equal application" theory and finding the State designed the statute to maintain white supremacy). Similarly, if we acknowledge that sexual harassment is part of a system of gender domination, then the fact that an employee harasses both sexes should be irrelevant to a determination that the behavior falls within the purview of Title VII.

who harasses both men and women."[87] Critics of this result note in particular that victims of equal opportunity harassment suffer the same effects of sexual harassment as victims of opposite-sex sexual harassment: "the offensiveness of the harassment is not lessened merely because the employer also harasses men. To the woman it is the harassment itself that offends."[88]

This loophole in Title VII doctrine has resulted in cases where the defendant invokes the "bisexual defense" as a means of avoiding liability under Title VII.[89] In cases like *Ryczek*, the defendant argues the alleged harasser is bisexual, and the court must then hear debate over his or her sexual orientation.[90] In other cases the defendant provides evidence that the alleged harasser sexually harassed members of both sexes equally.[91] In

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87. Ryczek v. Guest Servs., 877 F. Supp. 754, 761-62 (D.D.C. 1995). "In addition to this troubling possibility, the prospect of having litigants debate and juries determine the sexual orientation of Title VII defendants is a rather unpleasant one." *Id.* "One can only speculate as to what would be legally sufficient to submit the issue of a supervisor's bisexuality to the jury. Would the supervisor's sworn statement of his or her bisexuality be adequate? Would the supervisor need to introduce affirmative evidence of his liaisons with members of both sexes?" *Id.* at 762 n.7; *see also* Paul, *supra* note 39, at 351-52 ("The identical offense is sex discrimination under Title VII when perpetrated by a man against a woman, by a man against a man, by a woman against a woman, or by a woman against a man; yet if a bisexual of either sex preys equally upon men *and* women, he—or she—is beyond the reach of Title VII.")

88. Michelle Ridgeway Peirce, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1096 (1989).

89. *See, e.g.*, Raney v. District of Columbia, 892 F. Supp. 283, 287 (D.D.C. 1995) (noting defendants argued if any discrimination was committed it was perpetrated by bisexual supervisors, an offense not actionable under Title VII); *see also* Cabaniss v. Coosa Valley Medical Ctr., No. CV 93-PT-2710-E, 1995 WL 241937, at *13 (N.D. Ala. March 20, 1995) (noting defendants' argument that the alleged harasser treated males no differently than females); *Ryczek*, 877 F. Supp. at 761-62 (noting that the parties were arguing over the issue of whether defendant was bisexual or a lesbian); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1336 (D. Wyo. 1993) (describing defendant's argument that because he harassed both male and female employees, he did not discriminate against plaintiffs based on gender); *cf.* McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995) (finding that because defendant had not argued that the plaintiff's harasser also harassed the opposite sex, the defendant was still liable under Title VII); Paul, *supra* note 39, at 351-52 ("[I]f sexual harassment is sexual discrimination under Title VII, why are some perpetrators insulated? A savvy harasser need only note this anomaly and become an equal opportunity harasser.").

90. *See, e.g.*, *Ryczek*, 877 F. Supp. at 761-62 (stating that parties were arguing over issue of whether defendant was bisexual or a lesbian).

91. *See, e.g.*, *Cabaniss*, 1995 WL 241937 at *13 (noting defendants' argument that the alleged harasser treated males no differently than females); *Chiapuzio*, 826 F. Supp. at 1336 (describing defendant's argument that because

both types of cases courts typically decline to challenge the sexual harassment standards giving rise to this Title VII loophole.[92]

4. Sex Stereotyping

Recently, some feminist theorists have postulated that discrimination is not only about some individuals treating other individuals differently, but also about creating differences at a societal or institutional level that advantage and disadvantage people in unequal ways.[93] Under this "anti-subordination" theory, sex discrimination occurs in two steps. First it occurs through gender differentiation, creating mutually exclusive gender scripts for males and females. Second, it occurs by rewarding those characteristics[94] associated with being male and penalizing and subordinating those characteristics associated with being female.[95] Sex discrimination thus is the act of perpetuating a sexual hierarchy,[96] a social order in which men and all that is associated with being male rank higher than women and all that is associated with being female.[97]

Sexual harassment under this analysis is seen as a tool for maintaining the gender hierarchy; it is a method of control and

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the supervisor harassed both male and female employees, he did not discriminate against plaintiffs based on gender).

92. *See Raney*, 892 F. Supp. at 288 (holding a bisexual supervisor who singles out only one sex for sexual harassment liable under Title VII, but leaving unresolved the issue of equal opportunity harassment); *Ryczek*, 877 F. Supp. at 762 (declining to rule on the issue of whether a person who harasses members of both sexes escapes Title VII liability). *But see Chiapuzio*, 826 F. Supp. at 1337 (rejecting current sexual harassment standards and holding equal harassment of both genders does not escape Title VII liability).

93. MACKINNON, *supra* note 83, at 105; Becker, *supra* note 27, at 208; Finley, *supra* note 25, at 1154.

94. *See generally* JOYCE M. NIELSEN, SEX AND GENDER IN SOCIETY 16-17 (2d ed. 1990) (discussing types of rewards involved in a system of sex stratification).

95. BEM, *supra* note 63, at 80-81; *see also* EPSTEIN, *supra* note 65, at 9, 14, 233 (arguing society perpetuates gender inequality by ranking those characteristics associated with men higher than those associated with women); Capers, *supra* note 59, at 1160-62 (describing how society constructs and maintains a gender dichotomy); *cf.* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 70 (1990) (describing the ways in which society posits one-half of dichotomies as superior to others).

96. *See* Colker, *supra* note 26, at 1007-08 (discussing an anti-subordination approach to characterizing policies as discriminatory).

97. EPSTEIN, *supra* note 65, at 233.

punishment for those who deviate from scripted gender norms.[98] Andrea Dworkin writes, for example, that women's domain is the house and men's domain is the public world.[99] When a woman ventures into the wider world, "she is an unwanted alien, at best a guest worker with a short-term visa, a stigmatized immigrant."[100] Outside, she is in "male territory, a hands-on zone; her presence there is taken to be a declaration of availability—for sex and sexual insult."[101]

Feminist legal theorists have hailed the sex stereotyping theory as an effective tool in applying an anti-subordination approach to the problem of sexual harassment.[102] The Supreme Court first recognized the role sex stereotyping plays in sex discrimination in *Price Waterhouse v. Hopkins*.[103] The plaintiff,

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98. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 107 (1987) (arguing sexual harassment both expresses and reinforces the social inequality of women to men); Cain, *supra* note 25, at 200-01 (same); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCHOLOGIST 497, 503 (1991) (finding workplaces low in perceived equality are the site of more frequent incidents of harassment and concluding that sexual harassment both reflects and reinforces sexual inequality); *cf.* Anita F. Hill, *Sexual Harassment: The Nature of the Beast*, 65 S. CAL. L. REV. 1445, 1448 (1992) ("The reality is that [sexual harassment] is used to perpetuate a sense of inequality, to keep women in their place notwithstanding our increasing presence in the workplace.").

99. Andrea Dworkin, *Women in the Public Domain: Sexual Harassment and Date Rape*, *in* SEXUAL HARASSMENT: WOMEN SPEAK OUT 1-5 (Amber Coverdale Sumrall & Dena Taylor eds., 1992).

100. *Id.* at 2.

101. *Id.* at 4.

102. *See, e.g.*, Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 116 (1992) (comparing sex stereotyping expert Susan Fiske's analysis with current feminist scholarship).

103. 490 U.S. 228, 250-51 (1989). In *Price Waterhouse*, the partners in a national professional accounting firm denied plaintiff Ann Hopkins partnership in the firm. After serving five years in a senior management position, Hopkins received evaluations for partnership that noted she was an aggressive and competent executive. *Id.* at 234. The partners described Hopkins as an "outstanding professional" who had a "deft touch," a "strong character, independence and integrity." *Id.* One client described her as "extremely competent, intelligent," "strong and forthright, very productive, energetic and creative." *Id.* Some partners, however, characterized her aggressiveness as "macho." *Id.* at 235. Several partners criticized her use of profanity, one partner suggesting in response that they objected to her swearing "because it's a lady using foul language." *Id.* Another advised her to take a "course at charm school." *Id.* Finally, in explaining the firm's decision to put Hopkins's candidacy on hold, one partner advised that Hopkins could improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry." *Id.*

Ann Hopkins, successfully introduced the theory to the court through the expert testimony of Dr. Susan Fiske, a social scientist specializing in stereotyping.[104] Hopkins alleged Price Waterhouse had violated Title VII by permitting stereotyped ideas of women and appropriate female behavior to play a significant role in the denial of her partnership application.[105] The Supreme Court held Price Waterhouse unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to the partners' sex-stereotyped comments.[106]

The theory of sex stereotyping draws on a body of research in social psychology that explains stereotyping as a function of the organizational structure of the workplace and discrimination as a function of sex stereotyping.[107] According to Fiske, sex discrimination is not a rare occurrence traceable to the bad intentions of a few people, but a by-product of a workplace that lacks a high percentage of women in powerful positions.[108] When a group is dramatically underrepresented in an organization, employers and coworkers are more likely to perceive the token individuals in terms of their social category.[109] "People expect token individuals to fit preconceived views about the traits of the group, to manifest particular qualities. Tokens are highly visible as people who are different, and they are not often permitted the individu-

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104. *Id.*; Chamallas, *supra* note 33, at 95 n.36 (discussing the comparative and "but for" standards).

105. *Price Waterhouse*, 490 U.S. at 231-32.

106. *Id.* at 250-52.

107. *See* Chamallas, *supra* note 102, at 114-15 (describing how sex stereotyping research demonstrates the way organizational structure and culture influence individual perceptions).

108. Chamallas, *supra* note 33, at 96. Critical to Fiske's analysis was Hopkins's status as a "token woman" at Price Waterhouse, a phenomenon known in social science research as a "rarity." *Id.*

109. *Id.* The sex stereotyping theory, a derivative of the theory of sex role spillover, applies only to situations in which a member of a subordinate group is working in an environment predominately made up of members of a dominant group, typically a woman working in a mostly male occupation. BARBARA A. GUTEK, SEX AND THE WORKPLACE 132 (1985). In traditionally female jobs, where women are the working majority, the jobs themselves take on aspects of sex roles. *Id.* at 135. "Whereas women in nontraditional jobs are viewed as women in jobs, women in traditionally female jobs are viewed as women, period. The work role is the female sex role . . . ." *Id.* Different female jobs emphasize different aspects of the female gender role. For example, nursing and working with children, the aged, handicapped or poor are all jobs that reflect the nurturing aspect of the female gender role. *Id.*

ality of their unique, nonstereotypical characteristics."[110] For Fiske, the partners' gender-based characterizations of Hopkins were a predictable response to her status as a token woman who did not conform to traditional feminine standards.[111]

While *Price Waterhouse* was not a sexual harassment case, at least one court has extended the prohibition against sex stereotyping to sexual harassment law.[112] Courts have not, however, been as receptive to attempts to use sex stereotyping theory as a way of portraying same-sex harassment as sex discrimination.[113] In *Dillon v. Frank*,[114] for example, Ernest Dillon alleged his male coworkers had sexually harassed him by taunting him with lewd expressions.[115] At oral argument, Dillon advanced a sex stereotyping argument: his coworkers did not consider him "macho" enough and therefore verbally abused him based on prevailing stereotypes of what behavior is appropriate for men and women.[116] The court rejected the sex stereotyping argument, holding Dillon's coworkers deprived him of a proper work environment not because of his gender, but because of his alleged homo-

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110. Chamallas, *supra* note 33, at 96-97. Fiske noted that under conditions of rarity, evaluators will scrutinize women more closely than men on "feminine dimensions" such as social skills and personality, and that evaluators will focus less on "masculine" task or performance measures. *Id.* at 98. This means that a token woman's "shortcomings" become highly visible, in addition to being shaped in a gender-coded fashion. *Id.*

111. *Id.* at 98.

112. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). In *Robinson*, the plaintiff was one of a few women working in a skilled crafts position at the shipyards. Male employees described the worksite as a "boys club" and "more or less a man's world." *Id.* at 1493. Pictures of nude or partially nude women were visible throughout the workplace. The plaintiff used the sex stereotyping theory to provide a framework for placing the sexual behavior of men at shipyards into a larger pattern of gender stereotyping. *See* Chamallas, *supra* note 102, at 111 (describing the use of Fiske's testimony in arguing that sexual harassment is part of a greater form of sex discrimination).

113. *See* Capers, *supra* note 59, at 1176 (noting courts have been reluctant to find discrimination based on sex stereotyping in cases involving sexual orientation).

114. 58 Empl. Prac. Dec. (CCH) ¶ 41,332 at 70,101 (6th Cir. Jan. 15, 1992). Ernest Dillon worked as a mail handler at the Bulk Mail Center in Allen Park, Michigan.

115. During the course of his employment, his coworkers taunted him with expressions like "fag" and "Dillon sucks dicks." *Id.* at 70,102. Graffiti appeared on conveyer belts and loading trucks with the words "Dillon gives head." *Id.* at 70,102-03. When management failed to stop the harassment, Dillon sued in federal court alleging sexual harassment under Title VII. *Id.* at 70,103.

116. *Id.* at 70,105.

sexuality.[117] "These actions, although cruel, are not made illegal by Title VII."[118]

II. ANALYZING THE "BUT FOR" TEST, COMPARATIVE STANDARD, AND LEGISLATIVE SOLUTIONS TO THE PROBLEM OF SAME-SEX AND EQUAL OPPORTUNITY SEXUAL HARASSMENT

A. THE "BUT FOR" TEST AS A DISCRETIONARY TOOL FOR DISCRIMINATION

Victims of both same-sex and equal opportunity sexual harassment face two obstacles to establishing a prima facie case of sexual harassment, both derived from the Title VII requirement that a plaintiff prove harassment occurred "because of" sex. The first obstacle is purely definitional: what behavior constitutes harassment based on sex? While courts typically apply the "but for" standard to determine causation, the absence of any precise definition for "sex" allows judges wide latitude in defining the behavior for which the court may then hold a harasser liable.[119] This discretion negatively affects all victims of sexual harassment, but same-sex harassment strikingly illustrates the consequences

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117. *Id.* at 70,107.

118. *Id.* The court rejected the application of *Price Waterhouse* because the court could find "no specific evidence of sex-stereotyped remarks." *Id.* at 70,108. Critical to the court's analysis of remarks made to or about Dillon, was the assumption that "sex" in Title VII refers to what is biological, and not to gender: "Because the very concept and definition of the word 'sex' is at issue in this case, [this court] will generally use terms such as 'being male or female' to mean the genetic concept of the sex of a human as transmitted by the sex chromosome of the father." *Id.* at 70,104 n.2. Many courts have interpreted Title VII's "sex" provision to mean either sex or gender. *See supra* note 58 (citing cases which have interpreted "sex" in Title VII to mean either sex or gender).

119. In *Bennett v. Corroon & Black Corp.*, for example, the court found that while certain cartoons displayed in the workplace bearing plaintiff's name "were sexually oriented, crude, deviant and personally offensive," the plaintiff was not entitled to relief under the Louisiana equal employment statute because plaintiff had not shown that the cartoons were labelled with her name merely because of her sex. 517 So. 2d 1245, 1247 (La. Ct. App. 1987), *cert. denied*, 520 So. 2d 425 (La. 1988). "The cartoons in the men's room were labelled with the names of both male and female employees. This fact precludes plaintiff from establishing a case of sexual harassment." *Id.*; *cf.* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463-64 (9th Cir. 1994) (finding where supervisor who is abusive to both men and women, but limits gender-specific abuses to females, hostile environment is based on sex), *cert. denied*, 115 S. Ct. 733 (1995).

of judicial discretion for victims attempting to establish a prima facie case.

Because neither Title VII nor the Supreme Court has clearly defined "sex,"[120] courts are allowed to determine whether harassment occurs because of sex or because of factors which courts have determined lie outside the purview of Title VII, such as sexual orientation.[121] This discretion to invoke a victim's sexual orientation as a reason for dismissing a Title VII cause of action typically comes into play only in same-sex harassment cases. In a "classic" sexual harassment case in which a man sexually harasses a woman, the court typically does not raise the issue of sexual orientation. For example, the court does not reason that a man harasses a woman because he is heterosexual. But when a man harasses another man, most courts hold the harasser sexually harassed the victim not because of the victim's sex, but because of his real or perceived homosexuality.[122] If the court were to look consistently at the sexual orientation of the victim in determining whether harassment occurs because of sex, then the rationale that bars claims based on same-sex harassment would bar all claims of sexual harassment: sexual orientation is equally involved in both.[123]

Those courts that have accepted same-sex sexual harassment claims simply have applied the discretionary "but for" test in the opposite way. They have held sexual harassment by a homosexual supervisor of the same sex is an adverse employment action the subordinate would not have faced but for his or her sex.[124]

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120. *See* Valdes, *supra* note 58, at 23-24 (noting consequences of having no clear legal definition of "sex").

121. *See supra* note 76 and accompanying text (noting Title VII sexual harassment claims based on sexual orientation are not actionable).

122. *See* Dillon v. Frank, 58 Empl. Prac. Dec. (CCH) ¶ 41,332, at 70,104 (6th Cir. Jan. 15, 1992) (finding plaintiff's coworkers harassed him because they believed he was gay); Carreno v. Local Union No. 226, No. 89-4083-S, 1990 WL 159199, at *3 (D. Kan. Sept. 27, 1990) (finding plaintiff was not harassed because he is a male, but rather because he is a homosexual male); *cf.* Fox v. Sierra Dev. Co., 876 F. Supp. 1169, 1175 (D. Nev. 1995) (finding plaintiffs do not perceive work environment to be hostile to them because they are men, but because they may not be entirely at ease with sexuality in general or homosexuality in particular).

123. *See* Marcosson, *supra* note 77, at 32 (discussing sexuality as an element of all sexual harassment claims).

124. *See, e.g.*, EEOC v. Walden Book Co., 885 F. Supp. 1100, 1102 (M.D. Tenn. 1995) (stating same-sex sexual harassment is an adverse employment action that victim would not have faced but for his or her sex); Joyner v. AAA Cooper Transp., 597 F. Supp. 537, 542 (M.D. Ala. 1983) (same), *aff'd* 749 F.2d

Courts thus interpret virtually identical behavior as occurring because of sex in some cases and because of sexual orientation in others.[125] In distinguishing unlawful harassment based on sex or gender from lawful harassment based on sexual orientation, courts often conflate the concepts of sex, gender, and sexual orientation on "an ad hoc and strategic basis."[126] "The bottom line of the doctrinal status quo is that courts can and do characterize sex and gender discrimination as sexual orientation discrimination virtually at will."[127]

B. THE COMPARATIVE STANDARD—AN INEFFECTIVE MEASURE OF DISCRIMINATION

Victims of same-sex and equal opportunity harassment also face doctrinal difficulties in establishing prima facie cases of sexual harassment. Because Title VII is based on the formal equality doctrine,[128] courts in sexual harassment cases apply the comparative standard[129] to assess whether men and women receive equal treatment in the workplace.[130] Victims of same-sex and equal opportunity sexual harassment illustrate the inadequacies of this characterization of discrimination: discrimination can occur without regard to whether an employer treats a member of the opposite sex differently.

Sex discrimination occurs when one sex is subordinated to the other. A system in which one sex is subordinated to the other

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732 (11th Cir. 1984); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307, 310 (N.D. Ill. 1981) (same).

125. *Compare* Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1135-36 (C.D. Ill. 1995) (holding harassment was actionable where male supervisor subjected male employee to sexually suggestive comments and improper physical sexual contacts) *with* Ashworth v. Roundup Co., 897 F. Supp. 489, 490, 494 (W.D. Wash. 1995) (holding harassment was not actionable where male manager made sexually suggestive comments and improper physical sexual contacts to male employee). In cases involving anti-gay or heterosexual male to male harassment, courts universally interpret the harassment as occurring because of sexual orientation. *See supra* note 76 and accompanying text (discussing cases in which courts hold Title VII does not proscribe anti-gay harassment).

126. Valdes, *supra* note 58, at 23.

127. *Id.* at 24.

128. *See supra* notes 25-27 (discussing the equality doctrine generally).

129. *See supra* note 37 and accompanying text (discussing the comparative standard test generally).

130. *See* Chamallas, *supra* note 33, at 100 (discussing the relationship between the comparative standard and the goal of equal opportunity).

presupposes two distinct categories of people.[131] Thus, to preserve a system of discrimination, it becomes important to create and preserve differences between the sexes. When supervisors or coworkers harass an employee based on gender or gender stereotypes, they reinforce the differences that support a system of subordination. Harassment based on gender or gender stereotypes reinforces a system of sex discrimination despite the fact that the harasser does not want to harm a member of his or her own sex or treat a member of the opposite sex differently. A comparative standard thus fails to recognize these cases as sex discrimination.

C. LEGISLATIVE SOLUTIONS TO SAME-SEX AND EQUAL OPPORTUNITY SEXUAL HARASSMENT

One proposed solution to the problem of same-sex and equal opportunity sexual harassment involves either an amendment to Title VII to include sexual orientation as a protected class,[132] or new federal legislation to prohibit employment discrimination on the basis of sexual orientation.[133] Currently, victims of same-sex and equal opportunity sexual harassment are unable to bring claims under Title VII because courts find the category "sex" too narrow to include these types of harassment. While enactment of anti-discrimination legislation would make it easier for victims of same-sex and equal opportunity sexual harassment to establish a prima facie case of sexual harassment, such legislation fails to address the problems of using the "but for" and comparative standards in sexual harassment law.[134] The "but for" and com-

131. *See* FRYE, *supra* note 63, at 33 (discussing the way a system of domination and subordination is constructed).

132. *See, e.g.*, Peluso, *supra* note 17, at 1549-60 (arguing that sexual orientation should stand on equal footing with other classes protected by Title VII because it contains all of the elements that courts require of a suspect class); *cf.* Judith L. Dillon, Note, *A Proposal to Ban Sexual Orientation Discrimination in Private Employment in Vermont*, 15 VT. L. REV. 435, 471 (1991) (arguing that because courts are reluctant to grant legal protection to gays and lesbians under Title VII, state and local legislatures must enact anti-discrimination legislation).

133. The 104th Congress has introduced two bills that would prohibit employment discrimination based on sexual orientation. S. 932, 104th Cong. (1995); H.R. 1863, 104th Cong. (1995). The Senate bill is pending in the Committee on Labor and Human Resources and the House bill is pending in the Committee on Economic and Educational Opportunities.

134. *See supra* notes 128-131 and accompanying text (discussing problems with comparative standard in sexual harassment law).

parative standards[135] can effectively eliminate, at the judge's discretion, cases of harassment that do not involve women being treated differently from men, but that perpetuate gender stereotypes in ways that maintain systems of gender discrimination.[136]

III. AN ANTI-SUBORDINATION ANALYSIS: MOVING THE FOCUS FROM GENDER EQUALITY TO GENDER DOMINATION

A more effective solution to the problem of same-sex and equal opportunity sexual harassment focuses not on gender equality, but on the persistent domination of one gender by another. Rather than asking whether an employer treats men and women differently, the analysis asks how the perception of difference originates and how it is maintained.[137] Such a dominance analysis would replace both the "but for" and comparative standards with a test which asks whether the victim endured harassment that perpetuated gender stereotypes in the workplace. The dominance analysis attempts to disrupt the system of gender subordination through a three-step process. First, it recognizes the role gender differences play in sexual harassment. Second, it analyzes to whose advantage and disadvantage those differences work. Finally, it holds harassers accountable by imposing Title VII liability for harassment that reinforces gender differences and women's subordinate position in society.

A. THE DOMINANCE ANALYSIS

1. Recognizing Gender Differences

The most effective way to subordinate is to make it seem as if the dominance of men and the subordination of women occurs not because of any human decision or custom, but as a result of the

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135. *See supra* notes 32-40 and accompanying text (describing the "but for" and comparative standards).

136. *See supra* notes 83-97 and accompanying text (discussing discrimination on the basis of gender stereotypes as a form of sex discrimination).

137. *See* FRYE, *supra* note 63, at 13-14 (arguing that to analyze barriers to equality one must ask who constructs and maintains the barrier and to whose benefit or detriment it works); Chamallas, *supra* note 33, at 109 (arguing that rather than inquiring whether difference exists, the inquiry should be directed toward the ways in which the perception of difference "originates and is maintained").

natural consequences of biology.[138] One could argue that it appears natural that women act deferentially and passively and men act aggressively and competitively. Thus, it appears only natural that men advance further in their careers and earn more money because they are "naturally" more aggressive and competitive.

Feminists premise the gender domination analysis on the idea that sex discrimination exists predominately because of a rigid gender dichotomy that posits one sex (and its host of associated gender characteristics) as superior to the other.[139] The gender dichotomy works by first defining mutually exclusive scripts for being male and female and then by punishing those who deviate from their appropriate gender scripts.[140] A dominance approach to sex discrimination, then, recognizes that men and women act partly as they have been trained to act.[141] "That we are trained to behave so differently as women and as men, and to behave so differently toward women and toward men, itself contributes mightily to the appearance of extreme natural dimorphism .... We do become what we practice being."[142] If sex roles were biological, there would be no need for coercion, no need for penalties for nonconforming gender behavior.[143] Recognizing gender differences as social constructions provides an important first step toward the recognition of the methods by which society subordinates women.

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138. *See* FRYE, *supra* note 63, at 34. According to Frye:

> For efficient subordination, what's wanted is that the structure [gender hierarchy] not appear to be a cultural artifact kept in place by human decision or custom, but that it appear *natural*. ... It must seem natural that individuals of one category are dominated by individuals of the other and that as groups, the one dominates the other.

Id.

139. *See supra* notes 83-97 and accompanying text (discussing gender stratification generally).

140. *See* BEM, *supra* note 63, at 80-81 (describing how society constructs and maintains a gender dichotomy); EPSTEIN, *supra* note 65, at 140 (discussing the "constant enforcement of social controls on the behavior of men and women through punishments and rewards"); Capers, *supra* note 59, at 1160-63 (describing how society constructs and maintains a gender dichotomy).

141. *See generally* FRYE, *supra* note 63, at 23-34 (discussing how social controls influence the way men and women act).

142. *Id.* at 34.

143. *See* EPSTEIN, *supra* note 65, at 10 ("Social groups do not depend on instincts or physiology to enforce social arrangements because they cannot reliably do so."); FRYE, *supra* note 63, at 35-36 (discussing social pressure to conform to gender roles).

2. Policing Gender Boundaries

Because employers reward men more frequently than women, "men have a stake in justifying and continuing the status quo."[144] Preserving gender distinctions goes hand in hand with preserving the rewards men derive from these distinctions.[145] Sexual harassment acts in this context both as a penalty for departing from scripted gender norms and as a method of maintaining the gender hierarchy.

In opposite-sex, equal opportunity, and sexual harassment cases in which a homosexual supervisor harasses an employee of the same sex, the harasser makes the victim feel like a sex object. Sex objects are usually women.[146] For a woman, feeling like a sex object reminds her that she is a woman trespassing in a man's world; sexual harassment subordinates women by penalizing them for crossing gender boundaries.[147] Male victims of sexual harassment in these cases are victims of a "system of gender domination whose principle effect is to subordinate women."[148] When a person sexually harasses a man, the harasser both feminizes him and reinforces the idea that those qualities associated with women are subordinate to the qualities associated with men.[149]

The policing of gender boundaries is clearest in anti-gay

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144. EPSTEIN, *supra* note 65, at 9. "Challenges to a social order do not typically come from those who benefit from its arrangements." *Id.* Epstein also notes that dichotomous categories like male and female (and the host of characteristics associated with each) are "especially effective as an ideological mechanism to preserve advantage." *Id.* at 233.

145. *See* FRYE, *supra* note 63, at 13 ("The boundary that sets apart women's sphere is maintained and promoted by men generally for the benefit of men generally.").

146. "One of the ways gender stratification is maintained is by emphasizing sex role expectations. Being a sex object is part of the female sex role. Sexual harassment is a reminder to women of their status as sex objects; even at work, women are sex objects." GUTEK, *supra* note 109, at 10. Patricia Hill Collins argues that "domination always involves attempts to objectify the subordinate group." COLLINS, *supra* note 95, at 69. "As subjects, people have the right to define their own reality, establish their own identities, . . . [but] [a]s objects one's reality is defined by others, one's identity is created by others." *Id.* (quoting BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 42 (1989)).

147. *See supra* note 144 (describing the dichotomous categories of male and female).

148. Chamallas, *supra* note 102, at 129 (discussing the operation of sexism on the male sexual harassment plaintiff).

149. *See supra* notes 93-101 and accompanying text (discussing gender stratification generally).

harassment cases, where supervisors or coworkers harass an employee for exhibiting characteristics of the opposite sex. Goluszek's coworkers, for example, harassed Goluszek for being "effeminate."[150] Harassment was the penalty for not conforming to their image of male heterosexuality.[151] By policing gender boundaries in this way, Goluszek's coworkers preserved the differences between the sexes as well as the hierarchy which forms the basis of sex discrimination.

B. SEX STEREOTYPING—THE VALUE OF *PRICE WATERHOUSE*

Sex stereotyping theory plays an integral role in a dominance analysis of Title VII cases. The Court in *Price Waterhouse* held that Title VII prohibited employment discrimination based on sex stereotyping.[152] "[W]e are beyond the day," wrote Justice Brennan, "when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . ."[153]

Rather than asking, as the comparative analysis does, whether the partners at Price Waterhouse would have selected Ann Hopkins for partner if she were a man,[154] a dominance analysis examines which groups are in dominant and subordinate positions of power at Price Waterhouse and the reinforcing effect of sex stereotyping on those positions. In *Price Waterhouse*, men were overwhelmingly in positions of power.[155] Sex stereotyping reinforced their dominant position in two ways. It created expectations that Hopkins should exhibit stereotypically feminine

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150. Chamallas, *supra* note 102, at 129; *see also* Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2516 (1994) (arguing that Goluszek suffered either a form of gender discrimination against women—derision of some of the same qualities that make women targets for sexual harassment—or a form of discrimination against men that disciplines a subset of men for abandoning the qualities associated with men). For facts and holding of *Goluszek*, see *supra* notes 71-72 and accompanying text.

151. *See* Chamallas, *supra* note 102, at 127-29 (providing a dominance analysis of the *Goluszek* facts).

152. *See supra* notes 103-111 and accompanying text (discussing the facts and holding of *Price Waterhouse*).

153. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

154. *See supra* notes 103-106 and accompanying text (discussing *Price Waterhouse*); *see also* Chamallas, *supra* note 33, at 109 ("The comparative question presupposes that a judge can discover whether there are salient differences about the person being judged—besides a difference in gender—that might justify treating her unfavorably.").

155. *See Price Waterhouse*, 490 U.S. at 233 (describing the gender composition at the Price Waterhouse firm).

qualities that employers do not value in workers and then it penalized her for deviating from those expectations. "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch 22: out of a job if they behave aggressively and out of a job if they do not."[156] To preserve their dominant positions, the Price Waterhouse partners reinforced the distinctions between men and women and penalized Hopkins for not acting "according to script." After the partnership decision, the gender hierarchy was left intact: the partners were still overwhelmingly male, and Hopkins was still a subordinate.[157]

Stereotypical definitions of gender play a role in all of the various kinds of sexual harassment: opposite sex, same-sex, anti-gay, and equal opportunity harassment. Coworkers and employers punish men and women who do not conform to their "proper" gender roles. Men who express some characteristics of a female gender role, or women who express characteristics of a male gender role, blur lines and merge the distinctions between those that dominate and those that are dominated.[158] Sex stereotyping offers a way of holding people accountable when they use gender role nonconformity as a reason for harassment.

C. RESOLVING THE INADEQUACIES OF THE "BUT FOR" TEST

For victims of "classic" male on female sexual harassment, the dominance analysis would make it far easier for a plaintiff to meet the Title VII "because of ... sex" requirement.[159] Instead of having to prove gender was the sole reason for the harassment under the "but for" test, a plaintiff would have to show only that gender or gender stereotyping was one reason for the harassment. Under the current "but for" test, judges have the power to infuse their own value judgements about proper gender behaviors into their determinations about whether harassment occurred because of sex or because of "typical" male offensive behavior.[160] Ideas of

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156. *Id.* at 251.

157. *See supra* notes 103-111 and accompanying text (discussing *Price Waterhouse*).

158. *See supra* notes 146-149 and accompanying text (discussing how sexual harassment penalizes gender deviations for each type of harassment).

159. *See supra* text accompanying note 16 (describing the prohibitions of Title VII).

160. *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (finding no hostile environment created by posters of nude women displayed by plaintiff's male coworkers in their offices and by the repeated sexist obscenities

what constitutes "typical" male and female behavior are precisely the stereotypes this proposal seeks to eliminate. Allowing evidence of gender stereotyping to establish a prima facie case of sexual harassment significantly reduces judicial discretion because all harassment based on sex stereotyping would meet Title VII's "because of . . . sex" requirement.[161]

In the case of same-sex and anti-gay sexual harassment, this analysis similarly eliminates judicial discretion in conflating gender with sexual orientation.[162] In *Dillon v. Frank*,[163] for example, when the court applied the "but for" analysis to a case of same-sex harassment, it concluded Dillon's coworkers did not harass Dillon because he was a male, but because he was a homosexual male.[164] Using a dominance analysis in Dillon's case, a court would first focus on how Dillon's workplace constructs difference.[165] Dillon's coworkers singled him out and judged him because he did not conform to stereotypical gender norms.[166] His

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of coworkers), *cert. denied*, 481 U.S. 1041 (1987).

161. *See supra* notes 32-36 and accompanying text (discussing Title VII's "but for" analysis).

162. *See supra* notes 119-127 and accompanying text (discussing the tendency of judges to conflate sex with sexual orientation).

163. 58 Empl. Prac. Dec. (CCH) ¶ 41,322 at 70,101 (6th Cir. Jan. 15, 1992); *see supra* notes 114-118 and accompanying text (discussing the facts and holding of *Dillon*).

164. *See Dillon*, 58 Empl. Prac. Dec. (CCH) at 70,107 . The *Dillon* court also noted that in *Price Waterhouse* the Court found sex stereotyping created an "intolerable and impermissible Catch-22" (a woman who acts womanly will not get promoted, and a woman who does not act womanly will not get promoted). *Id.* at 70,108-09 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)). Dillon, the court argued, did not face such a Catch-22. *Id.* at 70,109. To argue because Dillon was a male, and male characteristics are consistent with those qualities valued in employment, misses the point of the *Price Waterhouse* decision. *Id.* The major focus of Title VII's legislative history, the Court noted in *Price Waterhouse*, is the intent to force employers to "focus on qualifications rather than race, religion, sex or national origin." *Price Waterhouse*, 490 U.S. at 243. When an employee endures harassment motivated in part because of gender—regardless of the employee's actual biological sex—that employee should be able to pursue a Title VII remedy. In *Price Waterhouse*, the Court did not state that a Catch-22 was required for sex-stereotyping to play a role in the court's analysis, only that in Hopkins's case the sex-stereotyping did in fact create such a dilemma. *See id.* at 251.

165. The sex stereotyping theory is useful here because it shows how the structural features of a workplace, demographics, and organization shape individual views about proper gender expectations and behavior. *See supra* notes 107-111 and accompanying text (describing the sex stereotyping theory generally).

166. *See* Marcosson, *supra* note 77, at 26. Marcosson states:

> One would not expect Dillon's coworkers to harass him with, "Dillon

coworkers did not perceive him as "macho" enough and verbally and physically abused him for demonstrating real or perceived characteristics of a subordinate sex.[167] Under the dominance analysis, a court should find gender stereotypes were prevalent in Dillon's workplace and the stereotypes stigmatized a member of a subordinate group to the advantage of a dominant group. To deny Dillon a cause of action under these circumstances is to preserve the gender hierarchy in his workplace; to hold his employer accountable for his harassment is to disrupt it.

D. RESOLVING THE INADEQUACIES OF THE COMPARATIVE STANDARD

Finally, the dominance analysis moves away from the idea that sex discrimination only occurs when women are treated differently than men. Under existing sexual harassment standards, victims of equal opportunity sexual harassment cannot prove the harassment they endured violated Title VII.[168] Defendants take advantage of this loophole by claiming the harasser was bisexual or that he or she harassed men and women equally.[169] The dominance theory recognizes that when an equal opportunity harasser sexually harasses both men and women, he or she reinforces the idea that being a sex object, a gender stereotype usually associated with women but also transferrable to men, is a subordinate status in society.[170] An equal opportunity harasser, like all people who harass, reinforces the sexual hierarchy by taking advantage of the sex object stereotype. The dominance analysis holds individuals liable for any harassment based on gender or gender stereotypes that reinforces this sexual hierarchy, regardless of the sex or sexual orientation of the victims.

> sucks dicks," and then quickly add, "But that would be OK if you were a woman." The fact that they harassed him over their belief that he did it, and did not harass any women, makes the distinction between what they found acceptable for one sex and not the other obvious . . . .

Id.

167. Dillon might have demonstrated certain real effeminate characteristics, but Dillon's coworkers believed that his effeminacy implied homosexuality. *Dillon*, 58 Empl. Prac. Dec. (CCH) at 70,105-07. Much of the abuse Dillon suffered was based on perceived "transgressions" of the male gender script.

168. *See supra* notes 81-88 and accompanying text (discussing the inability of victims of equal opportunity harassment to establish Title VII claims).

169. *See supra* notes 89-92 and accompanying text (discussing cases in which defendants raise the "bisexual defense").

170. *See supra* notes 146-149 and accompanying text (discussing sexual objectification as a means of policing gender boundaries).

CONCLUSION

The hypothetical case of the equal opportunity harasser, an inconsistency in sexual harassment doctrine that courts have universally acknowledged, has now become a reality. The increasing use of the "bisexual defense" to escape Title VII liability illustrates one of the fundamental inadequacies of the comparative standard in sexual harassment law. It leads one to question how courts can uphold the letter and spirit of Title VII's proscription against discrimination if they cannot, consistent with current sexual harassment doctrines, offer victims of equal opportunity harassment a remedy for the harassment they endure. The rise in same-sex sexual harassment suits has similarly challenged the logic of applying the "but for" test to sexual harassment law. Both same-sex and equal opportunity harassment cases compel the courts to reexamine their use of standards which are not only incapable of redressing the kinds of sex discrimination these victims endure, but are incapable of challenging the roots of sex discrimination common to all instances of sexual harassment. By recognizing that gender stereotypes systematically advantage men and disadvantage women, and by holding employers accountable for behavior that reinforces these gender stereotypes, a dominance analysis seeks to disrupt the gender hierarchy on which sex discrimination is based.